

No. 9444

In the United States
Circuit Court of Appeals
For the Ninth Circuit

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C. H. LEONARD,
Appellant,

vs.

SAMUEL R. BENNETT,
Appellee.

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APPELLANT'S BRIEF

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Upon Appeal from the District Court of the United
States for the District of Oregon.

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APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS
SHOWING JURISDICTION

Jurisdiction of the District Court—On the 22nd day of December, 1938, the appellee-debtor commenced this proceeding by filing in the District Court of the United States for the District of Oregon a Debtor's Petition for composition or extension of his indebtedness, pursuant to the provisions of Sec-

tion 75, Act of March 3, 1933, relating to bankruptcy (R. 1-4).

Appellee-debtor alleged that he "is personally bona fide engaged primarily in farming operations" in the County of Harney, State of Oregon (R. 2).

On December 31, 1938, the appellant filed a motion to dismiss this proceeding for the reason, among others, that appellee was not a farmer within the meaning of Section 75 of the Bankruptcy Act. 11 U.S.C.A., Section 203 (r). (R. 14-15.)

On October 19, 1939, the District Court made and entered an order overruling appellant's motion to dismiss the appellee-debtor's petition for composition or extension of his indebtedness and granting appellee leave to file an amended petition for adjudication as a bankrupt under Section 75 (s) of the Bankruptcy Act. 11 U.S.C.A. 203 (s). (R. 52-53.)

On November 14, 1939, appellee filed in the District Court of the United States for the District of Oregon an Amended Debtor's Petition for adjudication as a bankrupt under Section 75 (s) of the Bankruptcy Act (R. 54-55).

In his Amended Debtor's Petition appellee alleged "that he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) * * *" in Harney County, Oregon (R. 54).

On the 14th day of November, 1939, the District Court made an order adjudicating appellee a bank-

rupt (R. 72).

Appellee sought to invoke the jurisdiction of the District Court of the United States for the District of Oregon as a court of bankruptcy invested by law with jurisdiction within the State of Oregon in proceedings under the Bankruptcy Act. 11 U.S.C.A., Section 11.

Jurisdiction of the Bankruptcy Courts in proceedings under Section 75 (a-s) of the Amended Bankruptcy Act, 11 U.S.C.A. 203 (a-s) extends only to farmers as they are defined in the Act. Title 11 U.S.C.A. 203 (r). *Shyvers vs. Security First National Bank of Los Angeles* (9th Cir.), 108 Fed. (2d) 611.

The jurisdiction of the District Court of the United States for the District of Oregon was and is disputed by the appellant for the reasons (a) that neither the original nor the Amended Debtor's Petition alleges appellee is a farmer as defined in the Amended Bankruptcy Act. 11 U.S.C.A. 203 (r). (b) The record made on the hearing of the appellant's motion to dismiss establishes that appellee is not and was not a farmer within the meaning of the Act. (Post, 13-19)

Jurisdiction of the Circuit Court of Appeals.— This appeal is from the orders of October 19, 1939 (R. 52-53) and of November 14, 1939 (R. 72). Notice of the appeal was filed on the 27th day of November, 1939 (R. 72-73).

Notice of the entry of the order of October 19, 1939, was not served upon the appellant nor filed. In such instances, appeals may be taken within forty days from the entry of the order appealed from, and this appeal was taken within the time provided by statute. 11 U.S.C.A. 48 (a).

Title 28 U.S.C.A., Sec. 225, provides :

“The Circuit Courts of Appeals shall also have an appellate and supervisory jurisdiction under Sections 47 and 48 of Title 11, U.S.C.A. over all proceedings, controversies and cases had or brought in the District Courts under Title 11, relating to bankruptcy or any of its amendments, and shall exercise the same in the manner prescribed in those sections. * * *”

Title 11 U.S.C.A., Section 47, provides :

“(a) The circuit courts of appeals are vested with appellate jurisdiction from bankruptcy courts in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in bankruptcy * * * provided where an order or decree involves less than \$500 appeal must be upon application to the circuit court of appeals for allowance thereof.

(b) Such appellate jurisdiction shall be exercised by appeal and in the manner and form of appeal.”

The orders appealed from do not directly involve specific sums of money and are appealable, therefore, as a matter of right.

In Re Winton Shirt Company (3d Cir.), 104 Fed. (2d) 777.

Robertson v. Berger (2d Cir.), 102 Fed. (2d) 530-1.

STATEMENT OF THE CASE

Samuel R. Bennett, on December 22, 1938, filed in the District Court of the United States for the District of Oregon, a Debtor's Petition for Composition and Extension under the farmer-debtor provision of the Bankruptcy Act. In his petition he did not follow Form No. 65, adopted by the Supreme Court in its General Orders in Bankruptcy of June, 1936, containing the statements to be used by a petitioner; but in lieu thereof stated as follows:

"That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjoining the said city of Burns which has been operated by himself and his second mortgagee, and is now being operated for their mutual benefit."

The petitioner further stated that he is insolvent and that he desires to effect a composition or extension of time to pay his debts.

The District Court thereafter, on said date, approved the petition as properly filed.

On December 31, 1938, C. H. Leonard, a creditor, filed a motion in said court and cause, to dismiss the petition of the debtor, on the ground that the petitioner was not a farmer, and on other grounds.

On January 25, 1939, the District Court made an order of reference to Richard E. Kriesien, Conciliation Commissioner for Harney County, Oregon,

and ordered that the motion of C. H. Leonard be referred to the said Conciliation Commissioner for consideration.

On the 6th day of March, 1939, the said Conciliation Commissioner made and filed in said court an order as follows:

“Upon the above petition C. H. Leonard, a creditor, testified that the debtor is a full time employe, namely: District Grazier, District No. 4, Jordan Valley, Oregon, of the Division of Grazing, Department of the Interior of the United States and that said debtor is not personally engaged in farming nor does said debtor derive his principal income from farming activities. The debtor, Samuel R. Bennett, testified that during the past eighteen months he has been a full time employe of the United States Government in the capacity of District Grazier, District No. 4, of the Division of Grazing, Department of Interior on a yearly wage of \$1,860.00, and that said wage has been his principal source of income and that he has not been personally engaged in farming during said period. Debtor further testified that if he was successful in effectuating a composition or extension of his debts that he would retain his employment as District Grazier and hire employes to farm his land or if he could borrow sufficient money that he would return to and operate his farm personally, but that he could not indicate with any degree of certainty when he would be in a position to farm his property personally.

“In view of the fact that there was no dispute as to the question of the debtor’s employment by the United States Government and as debtor testified that his principal source of income was his employment in the Division of

Grazing, Department of the Interior of the United States and that he was not personally engaged in farming, the Conciliation Commissioner finds that the debtor is not a farmer as defined and classified by Section 75 of the Bankruptcy Act and now therefore, it is

“Ordered, adjudged and decreed that the petition of C. H. Leonard, a creditor herein, praying for the dismissal of the petition of Samuel R. Bennett, debtor, for a composition or extension under Section 75 of the Bankruptcy Act be and is hereby approved and the petition of Samuel R. Bennett be and is hereby dismissed on the ground and for the reason that said debtor is not a farmer within the meaning of Section 75 of the Bankruptcy Act; and the said question is certified to the Honorable Claude McCulloch, Judge of the said Court for his opinion thereon.”

On March 27, 1939, the debtor filed in said court and cause a proposal for composition and extension, and on said date also filed his petition for review of the order of the Conciliation Commissioner of March 6, 1939.

On April 15, 1939, there was filed in said cause, an order of the District Court, in which said court reserved its decision on the question of whether the debtor is a farmer, and referred the case back to the Conciliation Commissioner to determine whether or not the proposal of the debtor to his creditors already made, or as the same may be modified, includes an equitable and feasible method of liquidation for secured creditors, and for financial rehabilitation for the debtor.

On May 15, 1939, the debtor's amended proposal for composition and extension was filed, and on September 11, 1939, the Conciliation Commissioner made a finding and order on said matter as follows:

"After due consideration of the amended proposal, the evidence and the exhibits on file herein the Conciliation Commissioner finds:

"A. That debtor's amended proposal for a composition and extension does not include an equitable and feasible method of liquidation for the secured creditor, C. H. Leonard, for the reason that the same proposes that the secured creditor, C. H. Leonard, accept the sum of \$4,000.00 with interest thereon at the rate of 6% per annum as a full and complete satisfaction and discharge of the judgment possessed by the creditor, C. H. Leonard in excess of \$10,000.00. The debtor in his brief sets forth that the contested claim of C. H. Leonard is approximately \$5000.00 to \$6000.00 but proposes to pay the secured creditor, C. H. Leonard, the sum of \$4000.00. There having been no acceptance of the debtor's proposal by a majority in amount and number of the secured creditors the Conciliation Commissioner finds that Sub-section 'K' of Section 75 of the Bankruptcy Act where in the fair and reasonable market value of the property is taken into consideration in reducing the amount of the lien of any secured creditor has no application herein.

"B. The Conciliation Commissioner finds that the amended proposal for a composition and extension provides an equitable and feasible method of liquidation for the secured creditor, Federal Land Bank of Spokane, for the reason that the amended proposal contemplates a discharge in full of secured creditor's mortgage.

"C. The Conciliation Commissioner finds that if the secured creditor, C. H. Leonard, was

compelled to accept the sum of \$4000.00 as proposed by the debtor, that there is a probability of financial rehabilitation for the debtor but that the amended proposal contains the maximum revenue of which debtor's property is capable of producing."

On the 13th day of September, 1939, there was filed in said cause Debtor's Exceptions to the findings of the Conciliation Commissioner, and on the 30th day of September, the District Court entered in said cause the following order :

"Efforts to effect a composition having failed, and debtor, through his attorney, having applied in open court for leave to file an amended petition under Sub-section (s) of the Farmer-Debtor Act, such leave is hereby granted upon condition that amended petition be filed within thirty (30) days from date hereof."

And thereafter on the 19th day of October, 1939, the said District Court, made and entered in said cause the following order :

"This cause coming on for hearing on the motions of C. H. Leonard and the Federal Land Bank of Spokane to dismiss the petition filed by the debtor under Subdivisions (a) to (r) of the Farmer-Debtor Act on the grounds (1) that the debtor is not a farmer and (2) that the petition was not filed in good faith; the cause having been referred to Richard E. Kriesien, Conciliation Commissioner, upon said issues, and the Conciliation Commissioner having filed herein reports, exceptions to said reports having been filed and the said exceptions having been argued to the Court, and the Court being now fully advised in the premises, it is

“Ordered that the exceptions of the debtor to the reports of the Conciliation Commissioner be and the same hereby are sustained; and it is further

“Ordered that the said motions of the objecting creditors, C. H. Leonard and Federal Land Bank of Spokane, be and the same hereby are denied, without prejudice to the right of the creditors to raise the question of probability of rehabilitation in the event that the debtor should file an amended petition under Subdivision (s) of the Farmer-Debtor Act, in which event the record heretofore made upon that question may be used by either party upon the submission of that question for determination, and the parties may, in that event, submit such additional evidence upon that question that they may desire.

“And it appearing further from the report of the Conciliation Commissioner filed herein that efforts to effect a composition under Subdivisions (a) to (r) of said Act have failed by reason of the failure of the debtor to obtain the consents of the creditors as required by law, and the debtor having applied to the Court for leave to file an amended petition under Subdivision (s) of said Act, it is further

“Ordered that the debtor is hereby granted leave to file an amended petition under Subdivision (s) of said Act, provided said amended petition is filed within thirty (30) days from the date hereof; and it is further

“Ordered that the order heretofore made and entered on September 30, 1939, be and the same hereby is vacated.” (R. 52-3.)

Thereafter, on November 14, 1939, there was filed in said court the Amended Petition and Schedules of Samuel R. Bennett, and on said date the District

Court made and entered in said cause an order adjudging said Samuel R. Bennett, a bankrupt (R. 54-5).

QUESTIONS ON APPEAL

There are only two questions raised on this appeal:

(1) Do the appellee's petitions for (a) composition or extension of his indebtedness and (b) for adjudication in bankruptcy under the Farmer-Debtor Act as amended in 1935, 11 U.S.C.A. 203 (a-s) state sufficient facts to sustain the District Court's jurisdiction?

Appellant contends that they are fatally defective in that they do not allege that appellee is or was *personally* engaged in *farming*, nor deriving the principal part of his revenue from farming as that term is defined in Subsection (R) of Section 75 of the Bankruptcy Act as amended by Act, May 15, 1935.

The sufficiency of the petition itself in this respect was not directly challenged in the District Court, but being jurisdictional is not waived and may be presented on appeal.

(2) Is the debtor-appellee in fact a farmer within the meaning of the Act, as shown by the sworn testimony and evidence taken by the Conciliation Commissioner at the hearing held on appellant's Motion to Dismiss the original petition?

This issue was certified to the District Court by the Conciliation Commissioner on the record and findings of the Conciliation Commissioner (R. 37-8) and was adjudicated adversely to appellant by the District Court's order of October 19, 1939 (R. 52-53) and the Court's order of November 14, 1939, adjudging appellee a bankrupt under Subsection (s) of the Farmer-Debtor Act (R. 72).

SPECIFICATION OF ERRORS RELIED UPON

I.

That the District Court was without jurisdiction to approve the petition filed December 22, 1938, or to grant any relief thereunder, for the reason that the petition on its face shows appellee is not a farmer within the meaning of the Act.

II.

The court erred in denying appellant's motion to dismiss Appellee-Debtor's petition for composition and extension on the ground appellee was not a farmer, and in finding that appellee was a "farmer" within the meaning of the Act.

III.

The court erred in adjudging appellee a bankrupt under 75 (s) of the Bankruptcy Act as amended, for the reasons that the amended petition for adjudication in bankruptcy under (s) showed on its face that the appellee was not a farmer within the meaning of said Act and the record of testimony and evi-

dence before the court disclosed that the appellee was not in fact a farmer within the meaning of the Act.

SPECIFICATION OF ERROR NO. I.

That the District Court was without jurisdiction to approve the petition filed December 22, 1938, or to grant any relief thereunder, for the reason that the petition on its face shows appellee is not a farmer within the meaning of the Act.

POINTS AND AUTHORITIES

I.

“The term ‘farmer’ includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations.” Subdivision (r), Section 75, Bankruptcy Act as amended 1935.

11 U.S.C.A., Section 203, Subdivision (r).

II.

Where its lack of jurisdiction affirmatively appears of record, it is the duty of a court, sua sponte, to decline jurisdiction.

U. S. v. Corrick, 298 U.S. 435; 80 L. Ed. 1263.

Morris v. Gilmer, 129 U.S. 315, 326.

Hartog v. Memory, 116 U.S. 586; 29 L. Ed. 725.

ARGUMENT

The Bankruptcy Act under consideration is a special act intended to operate for a limited time and to apply to a particular class.

The Act carefully and specifically defines the term "farmer", for whose benefit the Act was passed. No one can claim the benefits of the farmer-debtor provision of the Act, unless the applicant can bring himself within the definition of "farmer" as found in Subdivision (r) of Section 75 of the Act as amended in 1935.

The Act in attempting to meet a national emergency carefully defines the term "farmer" to be (a) an individual who is primarily bona fide personally engaged in producing products of the soil; (b) an individual who is primarily bona fide personally engaged in dairy farming; (c) an individual who is primarily bona fide personally engaged in production of poultry; (d) any individual who is primarily bona fide personally engaged in the production of livestock; (e) any individual who is primarily bona fide personally engaged in the production of poultry products or livestock products in their unmanufactured state; and (f) any individual, the principal part of whose income is derived from his operations in primarily bona fide personally producing products of the soil, dairy farming, producing poultry, producing livestock, producing poultry products or livestock products in their unmanufactured state.

Any person who does not come within the foregoing definition of "farmer" is not entitled to the benefits of the Act.

An individual to be classed as a "farmer" under the Act must personally, primarily and individually be engaged either in producing products of the soil, dairy farming, producing poultry, producing livestock, producing poultry products or livestock products in their unmanufactured state. If an individual can comply with any one of the foregoing requirements, then he is a "farmer".

The Act further provides that an individual, the principal part of whose income is derived from one or more of "the foregoing operations" shall be classed a "farmer". Attention is called to the fact that "the foregoing operations" are all personal operations. The person claiming the benefits of the Act must show that he personally performed the acts mentioned in the Bankruptcy Act.

The petitioner on December 22, 1938, filed his petition asking for relief "under Section 75, Act of March 31, 1933." In his petition then filed he did not state sufficient facts to give the Bankruptcy Court jurisdiction. The following is his statement in an attempt to comply with Subdivision (r) of Section 75 of the Act:

"The petition of Samuel R. Bennett of Burns, in the County of Harney, District, State of Oregon, who is at present employed as a District Grazier by the Division of Grazing of the

Department of the Interior at Burns, respectfully represents that he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjacent to said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

The foregoing statement falls short of the requirements of the Bankruptcy Act. There is no showing of any primarily bona fide or personal engagements in producing products of the soil by the petitioner either then or at any other time. The petition does not follow or conform to the form of petition prescribed by the Supreme Court in its General Orders in Bankruptcy. The then form No. 65, which is now form No. 63, requires the petitioner to say as follows:

"That he is primarily bona fide personally engaged in producing products of the soil (or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations as follows." 298 U.S. 702.

By comparing the statement of "farming operations" as set forth in debtor's petition with Subsection (r) of the Bankruptcy Act as amended in 1935 and also with form No. 65 as promulgated by the Supreme Court, it is clearly shown that the petitioner in his petition did not state sufficient facts to

give the court jurisdiction.

The statement of the debtor "that he is personally bona fide primarily engaged in farming operations, or that the principal part of his income is derived from farming operations" is the identical language considered by the United States Supreme Court in *Louisville Bank vs. Radford*, 295 U.S. 599, in which the court said:

"The Act affords relief not only to those owners who operate their farms, but also to all individual land owners, and to persons who are merely capitalist absentees."

The court held this Act unconstitutional and Congress carefully amended the Act and defined "farmer" as set forth in the 1935 amendment as above quoted. Under the amended Act the petition of the debtor failed to show that the debtor was an individual who was entitled to the benefits of the Act of 1935.

*Court Bound to Notice Jurisdictional
Defects Sua Sponte*

When a petition is presented to the court, it is the duty of the court to determine whether or not the petition on its face shows that the petitioner has brought himself within the jurisdiction of the court. If the petition does so show, then the court may approve it as properly filed. If the petition does not meet the requirements and state the necessary jurisdictional facts, then it is the duty of the court to dismiss it for want of jurisdiction. In,—

U. S. v. Corrick, 298 U.S. 435; 80 L. Ed. 1263.
the Supreme Court said:

“The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined *sua sponte*, to proceed in the cause. *And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties made no contention concerning it.* While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.”
(Emphasis supplied.)

The petition of Bennett filed December 22, 1938, clearly shows that the petitioner was seeking relief under an act which was no longer in effect. When the petitioner advised the court that he was asking “for composition or extension under Section 75 of the Act of March 3, 1933”, the court should have then advised the petitioner that the court could not proceed under that act. When the court discovered from the petition that the only claim of “farming operation” of the petitioner was that of an absentee-landowner and that no claim was made in the petition that the petitioner was personally primarily or bona fide engaged in such farming operations, it was then the duty of the court to dismiss the petition for want of jurisdiction.

SPECIFICATION OF ERROR NO. II.

The court erred in denying appellant's motion to dismiss Appellee-Debtor's petition for composition and extension on the ground appellee was not a "farmer", and in finding that appellee was a "farmer" within the meaning of the Act.

POINTS AND AUTHORITIES

A "farmer" within the meaning of Subdivision (r) of the Bankruptcy Act as amended August 28, 1935, must be an individual who is primarily bona fide personally engaged in producing products of the soil, or a person, the principal part of whose income is derived from his personal activities in producing products of the soil.

Shyvers v. Security First National Bank of Los Angeles, 108 Fed. (2d) 511.

In Re Horner, 104 Fed. (2d) 600.

In Re Davis, 22 Fed. Supp. 12.

In Re Olson, 21 Fed. Supp. 504.

ARGUMENT

The original petition filed by the debtor does not show that the petitioner is a farmer within the meaning of Subdivision (r) of Section 75 of the Bankruptcy Act as amended in 1935. The debtor's schedule B-2, paragraphs (g), (h) and (k) (p. 9-R) shows that the debtor then had no carriages or other vehicles; no farming stock or implements of husbandry; no machinery, fixtures, apparatus or tools.

The debtor (p. 89-R) says his work horses and farming machinery were disposed of in 1934,—more than four years before he filed his debtor's petition.

In his narrative statement (pp. 81-89 R) the petitioner submits his proof of being a farmer as follows:

“I have been connected with farming and livestock operations all my life * * *. I worked on my father's ranch until I was 24 or 25 years of age. I went into the Forestry Service in 1909, and was in that service 15 years. During the time I was in the Forestry Service I had a 160-acre ranch up the river, and some livestock, about twenty head. The principal crop was truck farming, potatoes and alfalfa. During my connection with the Bureau of Forestry, my duties required full time with the service, and I farmed through hired help. My brother worked the ranch.” (p. 81 R).

Witness then testified that he acquired the Swick place, the Mace place and the Thornburg place and then says:

“I quit the Forestry Service in 1924 and devoted all my time to the operation of these lands (83 R). I moved away from the property in 1930 because I became involved so heavily and had so much against the land (p. 83 R). At that time the mortgage indebtedness against the land was around \$18,000. That included the amount owed to the Federal Land Bank and to Leonard. In 1935 the mortgages to the Federal Land Bank upon these tracts were about \$10,000, and I owed Mr. Leonard about \$8,000, making a total of about \$18,000. At that time the indebtedness was such that it was impossible for me to take it up (p. 84 R). The amount of

the decree in the suit which Mr. Leonard filed against me was about \$18,000, together with the Federal Land Bank. In my opinion the fair value of this property at the present time is about \$18,000" (84-R).

(Question by Conciliation Commissioner, p. 86-R)

"Q. Your present income since you have been employed by the Division of Grazing has been from your salary?

A. Yes.

Q. At no time have you been deriving any income from the farming of the land within the last 18 months, since you have been employed by the Division of Grazing? (86-R)

A. I have had a lot of cattle during that period and have done some farming.

Q. C. C. What has your income been from your farming operations since the time you entered the employ of the Government?

A. My personal living expenses and bills have all been paid by my salary.

Q. C. C. Can you estimate how much income you have derived from farming?

A. No.

Q. C. C. Have you personally engaged in farming since you have been employed by the United States Government?

A. I have not personally done my farming myself.

Q. C. C. Have you done any farming lately?

A. I am running a place on the lake for my daughter and had a band of cattle last winter.

Q. C. C. How was that run?

A. Hired help.

Q. C. C. You are the administrator?

A. Yes, sir. I stayed out in the Trout Creek ranch from about 1930 to 1935. Then I moved back here and run cattle for my daughter for about a year. I have lived in the vicinity of

Burns ever since. From the time I came back to Burns until I took the grazing position I was contracting in the summer for hay and running these cattle for my daughter. I wasn't working on the Swick land at the time. Mr. Leonard was operating under the agreement that he had with me, that the income would be applied to the indebtedness." (88-R)

Whatever may be claimed for farming operations of Bennett prior to 1934, we contend there is no evidence of any farming operations by him since 1934. According to his own statement as found on p. 89 of the record, he closed out whatever farming operations he then had in 1934. His statement is as follows:

"When I was farming on the Swick land I had work horses, plows, harrows, mowing machines and milking machines. They were sold in 1934."

The foregoing testimony of the debtor does not show that the debtor at the time he filed his petition was a "farmer" within the meaning of the Bankruptcy Act. The petition does not show,—

"That he is primarily bona fide personally engaged in producing products of the soil (or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations."

This is the language of form No. 65 adopted by the Supreme Court.

This court in

Shyvers v. Security First Nat'l Bank of Los Angeles, 108 Fed. (2d) 611 (9th Cir.)

holds that to qualify as a farmer within the meaning of the Bankruptcy Act the petitioner must be one who is primarily bona fide *personally* engaged in producing products of the soil, and does not include an absentee landlord. The court further says:

“We conclude that to come within this subdivision, the debtor must personally be engaged in farming. It is not enough to own farm lands which he or she leases to others who operate them.” (p. 612).

In Re Olson, 21 Fed. Supp. 504,

the court, in considering the same question, says:

“A careful reading of Subdivision (r) I think discloses that every operation enumerated to be engaged in by the individual is a personal operation.” (p. 508)

In Re Davis, 22 Fed. Supp. 12

the court, in considering this same subsection, says:

“A careful reading of the preceding language of the subdivision I think makes it clear that every operation enumerated to be engaged in by an individual is a personal operation. I conclude that if the debtor be a farmer within the meaning of this subdivision the debtor must be engaged in farming personally, and not merely own farm land which he or she leases to others who operate it” (p. 13).

In Re Horner, 104 Fed. (2d) 600

the Circuit Court of Appeals for the Seventh Circuit in considering the same question, says :

“The test in determining whether a debtor seeking a composition or extension of his debts under the section of the Bankruptcy Act dealing with agricultural composition and extension was a ‘farmer’ within the meaning of the Act was whether he was primarily bona fide personally engaged in producing products of the soil or whether the principal part of his income was derived from his activities in producing products of the soil” (p. 600).

Before the amendment of August, 1935, Subsection (r) of Section 75 defined “farmer” as follows :

“For the purpose of this section and Section 74, the term ‘farmer’ means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations.” 47 Stat. 1473.

After the decision of the Supreme Court of the United States in the *Radford* case, the foregoing definition of farmer was changed by Congress by the enactment of the amendment of 1935. 11 U.S.C. A., Section 203 (r).

After this amendment was adopted by Congress, the United States Supreme Court amended form No. 65 and by Rule 38 prescribed that the forms adopted by the court shall be observed and used. 298 U.S. 697-702.

The petitioner has made no attempt to qualify as a farmer under the Bankruptcy Act as amended in 1935. By his petition and by his testimony he attempts to qualify as a farmer under a statute which was not then in effect. It is not necessary to determine whether or not a statute not in effect has been complied with. We think it is clear that there is a failure to comply with the requirements of the present statute and that the court erred in not sustaining the motion of Leonard to dismiss.

SPECIFICATION OF ERROR NO. III.

The court erred in adjudging appellee a bankrupt under 75 (s) of the Bankruptcy Act as amended, for the reasons that the amended petition for adjudication in bankruptcy under (s) showed on its face that the appellee was not a farmer within the meaning of said Act and the record of testimony and evidence before the court disclosed that the appellee was not in fact a farmer within the meaning of the Act.

POINTS AND AUTHORITIES

Upon the filing of the debtor's petition, the judge shall enter an order either approving it as properly filed or dismissing it for want of jurisdiction.

Subsection (a) of Section 202, T. 11 U.S.C.A.
In Re Palma Bros., 8 Fed. Supp. 920.

ARGUMENT

In his amended petition filed November 14, 1939, the petitioner still seeks relief under a law not at that time in effect. He says that he is "personally bona fide engaged primarily in farming operations or that the principal part of his income is derived from farming operations" as follows: He then makes no further statement of farming operations. He made no claim of being a farmer within the meaning of Subdivision (r) of Section 75 of the Bankruptcy Act as amended in 1935. At the time the order of November 14, 1939, was made there was before the court the original petition, the testimony of the debtor and the amended petition, all of which show that the debtor is not a farmer within the meaning of Subdivision (r) of Section 75 of the Act of 1935. All of which shows that the court has no jurisdiction and that the original petition and the amended petition should have been dismissed for want of jurisdiction.

Respectfully submitted,

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